

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Century Investment Company,

Complainant,

vs.

CalTech International Telecom Corporation,

Defendant.

Case 02-02-016
(Filed February 6, 2002)**OPINION DISMISSING COMPLAINT****1. Summary**

Complainant seeks an order from this Commission revoking the operating authority of Caltech International Telecom Corporation (CalTech). The gravamen of the complaint is that Caltech's majority shareholder has committed fraud, mismanagement, and abuse of authority. Those issues are before the Superior Court in Contra Costa County in a suit filed by complainant. This decision defers to the Superior Court proceeding and dismisses this complaint, without prejudice, pending a decision in that forum.

2. Background

Century Investment Company (Century), a minority shareholder in CalTech, seeks a Commission order revoking CalTech's certificates of public convenience and necessity. It alleges, on information and belief, that CalTech stopped providing local exchange and long distance telephone service in 1998

and has failed to file required annual reports with the Commission. It alleges that Jeffrey Elkins, sole officer and director of CalTech and the majority shareholder, withdrew approximately \$3 million from CalTech's accounts in the year 2001 for his personal use, and that this constituted fraud, mismanagement and abuse of authority.

CalTech has been authorized by this Commission to provide long distance telephone service and to operate as a competitive local carrier to resell local exchange service in the territories of Pacific Bell and Verizon Communications. In its answer to the complaint, CalTech admits that it ceased providing telephone service in 1998 because of what it terms "the anticompetitive and illegal activities" of Pacific Bell. However, it states that it remains a viable California corporation, that it plans to offer telecommunications service again, and that it has filed all reports required or requested by the Commission. It denies the allegations of fraud, mismanagement and abuse of authority.

3. Motion to Dismiss

CalTech moves to dismiss this complaint on grounds that the issues of fraud, mismanagement and abuse of authority have been asserted by Century in a suit filed last year in the Superior Court in Contra Costa County (Case No. CIVMSC01-03361). In that case, Century alleges that CalTech received a substantial settlement in its antitrust suit against Pacific Bell (U.S. District Court, N.D. Cal., Case No. C 97-2105 JH), and has refused to distribute settlement monies to other shareholders. Century in its lawsuit alleges breach of fiduciary duty, conversion, unjust enrichment and fraudulent conveyance.

CalTech argues that it would be a waste of Commission resources to look at the same issues as those before the Superior Court, and it accuses Century of harassment in filing substantially identical claims in two forums.

4. Discussion

First, we take official notice that examination of the Commission's telecommunications records shows that CalTech has submitted its annual report and affiliate transaction report for the year 2001 in compliance with Telecommunications Division requirements.

Second, we take note of a Certificate of Status issued by Secretary of State Bill Jones on March 7, 2002, certifying that CalTech became incorporated in California on January 3, 1995, and that the corporation remains in good standing in the State of California.

Third, we have the sworn representation by CalTech that, while it transferred its customers to other carriers in 1998, it nevertheless plans to offer telephone service again and has a valid contract with a carrier to purchase and resell, under CalTech's name, wireless telecommunications services.

While there may be some remaining issues in these areas, the gravamen of the complaint before us is the allegation that CalTech's majority shareholder has committed fraud, mismanagement, and abuse of authority. These issues are before the Superior Court, and principles of judicial comity suggest that we not duplicate that court's consideration of these matters. (*See, Cox California Telcom v. Crow Winthrop Development*, Decision 00-11-038, 2000 Cal PUC LEXIS 950.) Moreover, it is appropriate that tort issues like these be considered in Superior Court, since that court has the ability to award money damages, while we do not. (See Pub. Util. Code § 734; *Jones v. PT&T Co.* (1963) 61 CPUC 674.)

Accordingly, we will dismiss this complaint without prejudice to refile after the Superior Court action is resolved. We note that some of the counts alleged by complainant appear beyond the jurisdiction of this Commission, but we will deal with that if and when the complaint is refiled. We choose to dismiss

rather than stay this proceeding because Pub. Util. Code § 1701.2(d) requires that adjudication cases be resolved within 12 months, and it is unclear how long the civil court action will continue.

In view of our dismissal of this case, the various motions made by the parties are denied. The motions may be reconsidered if and when the case is refiled.

The scope of this proceeding is set forth in the complaint and answer. We confirm Administrative Law Judge (ALJ) Walker as the presiding officer, and we find that no hearing is necessary.

5. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. No comments were received.

Findings of Fact

1. CalTech is authorized to provide long distance telephone service and to operate as a competitive local carrier to resell local exchange service.
2. CalTech ceased providing telephone service in 1998, transferring its customers to other carriers.
3. CalTech has submitted its annual report and affiliate transaction report for the year 2001.
4. A Certificate of Status issued by the Secretary of State shows that CalTech remains in good standing in California.
5. Century is a minority shareholder of CalTech.
6. Century seeks revocation of CalTech's operating authority on grounds that CalTech has ceased providing service, has failed to file annual reports, and has committed fraud, mismanagement and abuse of authority.

7. Century in 2001 brought suit against CalTech in Contra Costa County Superior Court alleging breach of fiduciary duty, conversion, unjust enrichment and fraudulent conveyance.

8. The lawsuit in Contra Costa County Superior Court is continuing.

Conclusions of Law

1. The gravamen of the complaint is the allegation that CalTech's majority shareholder has committed fraud, mismanagement, and abuse of authority.

2. The issues of fraud, mismanagement and abuse of authority are before the Superior Court, and principles of judicial comity suggest that we not duplicate that court's consideration of these matters.

3. The complaint should be dismissed without prejudice to refile after the Superior Court action is resolved.

4. Motions made by the parties should be denied.

O R D E R

IT IS ORDERED that:

1. The complaint of Century Investment Company against CalTech International Telecom Corporation is dismissed without prejudice to refile at a later time.

2. Motions made by the parties are denied.
3. Case 02-02-016 is closed.

This order is effective today.

Dated _____, at San Francisco, California.